UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AIRWAY CLEANERS, LLC

Employer

and

LOCAL 32BJ, SERVICE EMPLOYEES INTERNATIONAL UNION, **Case #: 29-RC-153440**

Petitioner

LOCAL 660, UNITED WORKERS OF AMERICA

Intervener

INTERVENOR'S REQUEST FOR REVIEW OF THE DECISION AND DIRECTION OF ELECTION

Pursuant to §102.67 of the Rules and Regulations of the National Labor Relations Board, Intervener Local 660, United Workers of America, hereby seeks review of the Decision and Direction of Election in this matter issued by the Regional Director on June 15, 2015. Pursuant to the requirements of §102.67(c), Intervener's request review for the is based on the following subsections of that section:

(1) A substantial question of law and policy exist because of (ii) a departure from officially reported Board precedent;

(2) The Regional Director's decision on a substantial fact is clearly erroneous

(3) The conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; and

(4) There are compelling reasons for reconsideration of an important Board rule or policy.

Regarding subsections (1), (2) and (4) Intervener requests review of that portion of the DD&E that finds that the NLRB has jurisdiction over the Employer in this matter given the recent decision in *Browning Ferris Industries of California, Inc., et.al., and Sanitary Drivers and Helpers Local 350, IBofT, 362 NLRB No. 186* which effected a seminal change in the "joint employer" standard and has applied the new standard retroactively.

Regarding subsection (3), the Hearing Officer denied enforcement of a subpoena issued on behalf of Intervener to Airway to obtain documents concerning jurisdictional issues at terminals 1, 4, 7 and 8. The hearing officer required Intervener to make an offer of proof concerning documents it did not posses, he denied enforcement of the subpoena on the ground that the evidence would be "cumulative" (Tr. 6/22/15 pgs. 77 l. 15-22 & 78, l. 9-13) This decision was based on the evidence introduced at an earlier hearing involving the same parties (plus an additional Union, Local 621 UCTIE as petitioner) but which involved the employees at Terminal 8 alone (see *Airway Cleaners, LLC, 382 NLRB No. 87).*[1] Intervener requested the right to file a special appeal based, in part on the fact that the instant case involves the Employer's operation at Terminals 1, 4, 7 and 8 (and many more airlines), which was granted. The Special Appeal was filed on June 23, a copy of which is attached hereto as Exhibit A) and denied by the Regional Director and refused to reopen the record (see the DD&E at page 6).

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[1] The hearing officer originally took judicial notice of the entire record in that case (Tr. 6/15/15, pg. 16, lines 2-13) and thereafter the parties herein agreed to incorporate the complete record in the prior case into the record of this proceeding. (Tr. 6/22/15 pg. 36, l. 9-25).

SUMMARY OF EVIDENCE

A hearing concerning the issue of NLRB v. NMB jurisdiction was held on August 6 – 7, 2013, in connection with *Airway Cleaners, LLC*, the record of which has been incorporated herein. Unless otherwise all citations are to the record in that matter the case number of which is 29-RC-099871[2]. In Terminal 8, Airway service planes of American Airlines ("AA"). All of the approximately 300 employees are employed to clean the cabins of planes, the terminal, air carrier club and to staff the club. (B. Ex. 1)[3].

AA , as well as the other carriers, have the ability to exert control over the terms and conditions of employment of Airway employees either directly or indirectly in many ways, by contract or otherwise. The contract with AA is illustrative and sets forth a significant number of ways in which the airline can exert control over the terms and conditions of employment of the unit employees. Some of these are:

1. AA has the right to request removal of any Airway unit employee who, in its sole discretion, are guilty of improper conduct or who are not, in the opinion of AA, qualified to perform the job. (B. Ex. 1, Exhibit 4 ¶2h);

2. Airway can only change staffing upon 30 days notice and cannot materially change the composition of the staff without the prior written consent of AA. (B. Ex. 1, Exhibit 4 ¶2h);

3. AA dictates the method of timekeeping that Airway must use for its employees (B. Ex. 1, Exhibit 4 ¶2c);

4. AA reserves the right to interview and approve Airway management and unit employees (B. Ex. 1, Exhibit 4 ¶2e);

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[2] All cites are referenced in and taken from the post hearing brief submitted on behalf of Airway Cleaners LLC by Ian B. Bogaty, Esq., Jackson Lewis LLP.

[3] References are to the hearings on August 6 & 7, 2013. Board exhibits are cited as "B. Ex__", Local 32BJ exhibits as "Intervener 32BJ Ex.__" and Airway exhibits as "Emp. Ex.__".

5. Airway must perform all services as set forth in the contract was well as the requirements of Federal Aviation Regulations and other federal, state or local laws (B. Ex. 1, Exhibit 4 ¶1(2);

6. Airway is subject to monetary damages for failing to meet performance standards (B. Ex. 1, Exhibit 2, Attachment 3 ¶2):

7. Airway must request AA authorization for all overtime (B. Ex. 1, Exhibit 3 ¶2(c));

8. AA can increase or decrease daily manpower without penalty (B. Ex. 1, Exhibit 3 ¶2(a));

9. AA requires that Airway employees comply with AA policies (e.g. Code of Conduct) (B. Ex. 1, Exhibit 1 2b);

10. Airway must maintain all records and information pertaining to the services performed and to conduct monthly reviews of such records, which information must be provided to AA for review. In addition, AA has access to all of Airway's records and information related to the services performed. (B. Ex. 1, Exhibit 1 ¶1 and Exhibit 4 ¶1g);

11. Unit employees are required to report any complaints relating to the services provided to their immediate supervisor, who, in turn, responsible for reporting same to AA personnel immediately (B. Ex. 1, Exhibit 4 ¶1b);

12. Unit employees must report to work in uniform and are responsible for maintaining appearance standards determined by AA (B. Ex. 1 Exhibit 4 ¶2g).

13. AA sets the guidelines for Airway's training of unit employees. AA reserves the right to monitor and test unit employees' training levels and AA reserves the right to require additional training at its discretion and without additional compensation to Airway. (B. Ex. 1, Exhibit 4 ¶3); and

14 Airway is required to have a supervisor on site at all reasonable times to consult with AA representatives regarding the service(s) provided (Ex. B, Exhibit 4 ¶2i).

The record reflects that other carriers at JFK have similar provisions in the contracts with Airway. The Terminal One Group Association, L.P. ("TOGA")[4] has a contract with the following conditions, inter alia:

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[4] The international carriers that own Terminal 1 (Lufthansa, Air France, Japan Airlines ("JAL") and Korean Airlines that own Terminal 1 are members of the management group to operate Terminal 1 (Tr. 16-18, Int. 32BJ Exs. 1(f), 1(g).

1. TOGA requires that Airway background checks, as permitted by law, "which...include, but not be limited to, a five year criminal history for all persons Contractor has hired or will hire." (Int. 32BJ Exs. 1(f), 1(g));

2. TOGA can, on 30 days notice, unilaterally terminate its contract with Airway. (Int. 32BJ Ex. 1(g) ¶3.3);

3. TOGA can ask that Airway "remove any offending personnel from TOGA's operation or facility". (Int. 32BJ Ex. 1(g) ¶9.4).

The record reflects that the air carriers are also involved in both the discipline up to and including termination of Airway unit employees.

In addition, the record reflects that the air carriers have had significant influence on the discipline of unit employees. Airway terminated a unit employee when AA requested that it do so (Tr. 79). Representatives of TOGA have also requested that Airway employees be disciplined (Tr. 79-82; Emp. Exs. 18, 19) and TOGA representatives have "reprimanded" Airway employees (Emp. Ex. 37). Air France demanded to meet with Airway employees to "discuss the ongoing issue" of liquor missing from its flights. (Emp. 36).

The carriers have also imposed additional carrier safety requirements in the hiring process. Airway employees must have security clearance to access parts the terminals. While these Airway employees are required to meet the Port Authority requirements for back ground checks, AA has it's own background check which it requires for Airway employees and it is the same as the background check for AA employees (Tr.43) TOGA specifies a specific and comprehensive background check , including a 5 year criminal background check, which Airway employees must undergo. (Int. 32BJ Exs. 1(f) and (g).

The airlines are also require specific training and set training standards for Airway. (Tr. 31-36, 46-47, Emp. Exs. 3, 7). AA supplies the materials required to train Airway employees and they are trained at AA's facilities and on board AA planes at no

cost to Airway. (Tr. 35). AA tracks employee training to insure compliance and Airway employees must undergo supplemental training, at the carrier's sole discretion. (Tr. 118). AA has created a database to track compliance with and the Airway employees are given a "fake" AA-JFK identification number to monitor compliance (Tr. 36; Emp. Ex. 5). Interestingly, the Senior Manager of Customer Care for AA at JFK is listed as the manager of the Airway employees. (Tr. 40; Emp. Ex. 5). Any Airway employee who does not complete the required training cannot work for the carrier (Tr. 45, 50, Emp. Ex. 6). Additionally, Airway is fined $100 by AA for every employee who does not complete the required training (Tr. 51).

The carriers also determine the hours of work of Airway employees, either by flight schedules or requiring service during specified hours each day. (Tr. 29, 30, 55). In addition, Airway must get approval from AA to increase the number of its employees providing service to the carrier even if the need for the increase is the carrier's increase in the number of scheduled flights. (Tr. 29, 30) In addition, Airway must adjust its staffing to accommodate flight delays. However, before assigning overtime, Airway must have the overtime approved by the carrier beforehand. (Tr. 56, 57, 187, B. Ex. 1).

Carriers have similar control over the terminal cleaning staff. AA has required a number of staffing changes (Emp. Exs. 21, 22, 23 & 24). Air France has similar control (Tr. 220-221; Emp. Ex. 34) and has requested similar increases in manpower (Tr. 220, Ex. 34), as did TOGA (Emp. Ex. 35).

The carriers have also exerted control over Airway's disciplinary policy. In one particular instance TOGA requested that Airway implement a policy prohibiting the use of non-transparent personal bags and post a notice to employees informing them of same.

TOGA rejected the proposed policy/notice and approved it only it was changed to include [5]reference to more severe discipline. (Tr. 109-111, Emp. Exs. 29, 30).

SUMMARY OF ARGUMENT

Intervener's legal argument is simple. First, The Board's recent ruling in ***Browning Ferris, supra,*** changed the Board test for joint employer status. Given that the Board held it was to be applied retroactively, the evidence in this matter clearly establishes that both the airline involved (American) and TOGA (the agent of the four airlines involved) are joint employers with Airway. It is respectfully submitted that given this joint employer status, the Board cannot assert jurisdiction in this matter. See 45 USC §181, 29 USC §151(2).

Second, the Regional Director erred when he denied Intervener's special appeal to introduce additional evidence. Board rules clearly require that all parties to a hearing be allowed to introduce all relevant evidence. See NLRB Rules and Regs. §102.66. There can be no question that evidence regarding involvement on the part of the airlines or their respective agents in discipline is both relevant and material to the issue of joint employer status pursuant to ***BrowningFerris, supra.***

CONCLUSION

For the reasons stated above, Intervener Local 660 requests review of the Decision and Direction of Election herein.

Dated: September 21, 2015

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[5] Intervener tried to introduce additional evidence, particularly related to more recent instances of the airline or the representative of airlines being involved in the disciplinary process but was prevent from doing so based on the Regional Director's ruling that it would be cumulative.

Respectfully submitted,

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CERTIFICATION

I, Bryan C. McCarthy, hereby certify that on September 21, 2015, I served a copy of the attached Request for Review of the Decision and Direction of Election by e-mail on the following people at the e-mail addresses indicated:

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Dated: September 21, 2015

Bryan C. McCarthy